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No. 89-1966

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

RICHARD A. BANKS,
Petitioner, Plaintiff

v.

H. LAWRENCE GARRETT, III
Secretary of the Navy,
Respondent, Defendant

BRIEF FOR THE PETITIONER IN REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Federal Circuit

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QUESTION PRESENTED

WHETHER THE MILITARY NECESSITY DOCTRINE IN GOLDMAN V. WEINBERGER, WHICH RESTRICTS THE FIRST AMENDMENT RIGHTS OF MILITARY PERSONNEL ON ACTIVE FULL-TIME DUTY, SHOULD BE APPLIED TO A RESERVIST WHEN HE IS NOT IN ANY DUTY STATUS WHATSOEVER.

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RICHARD A. BANKS, PETITIONER

v.

H. LAWRENCE GARRETT, III
SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONER IN REPLY TO OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B12) is reported at 901 F.2d 1485. The opinion of the district court (Pet. App. A9-A24) is reported at 705 F. Supp. 282.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1990, and a petition for rehearing was denied on March 12, 1990. The petition for a writ of certiorari was filed on June 11, 1990 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

I.

STATEMENT

In his reply Petitioner Richard A. Banks ("Banks") will address only the aspects of this case relevant to the issues raised in the Brief For The Respondent In Opposition.

It is clear from the opposition of the Respondent H. Lawrence Garrett, III, Secretary of the Navy ("the Navy") that the Navy relies totally on three points to determine what constitutes "in naval service" and "official capacity" for the purpose of applying Article 1149 to Banks:

(1) use of official Navy letterhead;
(2) reference to a military service title, and
(3) content relevant to Navy matters.
(Rspdt. 6)

However, at the time Banks wrote the letter in question and caused copies to be sent to Congressmen he had completed his active duty and was not in any duty status either pay or non-pay. He was not eligible for any service related benefits such as medical disability in case he injured himself at that time. See Woods v. Covington County Bank, 537 F. 2d 804, 810-811 (1976); 45 Comp. Gen 405. His status was that of a civilian to the Navy for all purposes except denial of his First Amendment rights under Article 1149 of Navy Regulations.

Further, at the time he wrote the letter he was not subject to any military discipline. He was not subject to the jurisdiction under the Uniform Code of Military Justice ("Code"), (Uniform Code of Military Justice ("UCMJ"), Art. 2, 10 U.S.C. §802, Duncan v. Usher, CMA 1986, 23 MJ 29), the Hatch Act, or any other act which applied to personnel in active duty status. It is evident that if he had been under the jurisdiction of the Code

the Navy would have exercised its authority thereunder. However, Banks, because he was an off-duty reservist, was not subject to court martial or other punitive actions authorized by the Code. This is the true reason the Naval Investigative Service investigation initiated by the Navy fizzled out. (Trial Exhibit 18)

The Navy was undoubtedly well aware it had no UCMJ jurisdiction over Banks. Duncan v. Usher, CMA 1986, 23 MJ 29.

Despite the fact that Banks was not considered in any duty status at the time of writing the letter in issue, the Navy asserts that Article 1149 may be broadly interpreted pursuant to Goldman v. Weinberger, 475, U.S. 503 (1986) to encompass Banks' conduct because of the letterhead and the content of the letter in which he discusses a public Navy matter and because he uses his title.

II.

ARGUMENT

A. IT IS AN IMPORTANT QUESTION FOR THIS COURT TO CONSIDER WHETHER GOLDMAN v. WEINBERGER, WHICH RESTRICTS THE FIRST AMENDMENT RIGHTS OF MILITARY PERSONNEL ON FULL-TIME ACTIVE DUTY, SHOULD BE APPLIED TO OFF-DUTY RESERVISTS

The application of Goldman v. Weinberger, supra, to off-duty reservists extends the restrictions of that case to many millions of reservists and retired military personnel and may undermine the basic premise of the reserve system. The

appropriateness of such extension is an important question for review by this Honorable Court.

Petitioner Banks, as stated in the Amicus Curiae Brief In Support of the Granting of Petitioner - Plaintiff's Petition For Writ of Certiorari to the United States Court of Appeals For the Federal Circuit of the Government Accountability ("Amicus Curiae"), presents the question of whether this Honorable Court's decision in Goldman v. Weinberger, supra, should be overturned. However, most importantly, Petitioner Banks in this case presents the critical and far-reaching question whether the Goldman case should be applied to a reservist when he is not in any duty status.

Comparing the facts of Goldman v. Weinberger, supra, with this case, we find Petitioner S. Simcha Goldman in Goldman v. Weinberger, supra, was in active regular service in the United States Air Force at the time he insisted on wearing his yarmulke while on duty on the base in violation of AFR 35-10. Goldman v. Weinberger, supra, at 503. On the other hand Petitioner Banks in this case was a reservist, not in any duty status at the time he wrote his letter. He had completed his reservist term of duty. He was not earning service pay for his time at the time he wrote the letter, although his reservist position was categorized in a pay billet. There is no basis to extend the Goldman v. Weinberger decision to the facts of this case. Respondent cites no authority for its proposition that Goldman v. Weinberger, supra, somehow applies to an off-duty reservist because he uses Navy letterhead and his title and discusses public Navy matters in a communication to Congressmen.

The test for reviewing a military regulation cited in Goldman v. Weinberger, supra, indicates otherwise. The test is "whether 'legitimate military ends are sought to be achieved'

[citations omitted] and whether it is 'designed to accommodate the individual right to an appropriate degree'." Goldman v. Weinberger, supra, at 506. In the case at bar if we apply this test to the application of Article 1149 to Petitioner Banks as an off-duty reservist, his individual right must be accommodated. This is true particularly in light of 5 U.S.C. §2105(d) which states an off-duty reservist is not a public employee, directly contrary to the court of appeals opinion in this case. The individual right in issue here is a civilian's First Amendment right to write to Congressmen. With respect to any legislative or regulatory intrusion on such First Amendment rights, strict construction is required. Elfbrand v. Russell, (1966), 384 U.S. 11, 86 S.Ct. 1238, 16 L. Ed 2d 321; Wolf v. Selective Service Local Bd No. 16 C.A.N.Y., (1967), 37 F. 2d 817. Article 1149 cannot be read loosely and broadly to encompass conduct of an off-duty reservist simply because the Navy may consider the correspondence embarrassing or some sort of threat. The superficial fact of what letterhead was used and Banks' reference to his title to show that he was in a position to know what he was writing about is not controlling. The type of letterhead and use of title are not sufficient to outweigh a civilian's First Amendment right to voice a concern to his legislative representatives. What is controlling is the applicable federal statute, 5 U.S.C. §2105(d) and the Navy's consistent treatment of off-duty reservist personnel as civilians in all other aspects of Navy business.

B. THE CONSTITUTIONALITY OF THE NAVY'S USE OF ARTICLE 1149 AS A CONTENT BASED RESTRICTION ON AN OFF-DUTY RESERVIST'S COMMUNICATION TO CONGRESSMEN IS A QUESTION OF PARAMOUNT IMPORTANCE.

In the opposition brief, the Navy takes great pains to assert Article 1149 does not restrict Banks' letter because of its content but based on the fact he used his title which somehow is "official capacity" within Article 1149. (Rspdt. 5) This is absurd. Of course, it was the content of the letter that aroused the wrath of the Navy. If Banks had written about some other matter such as social security benefits to seniors in his local community on Navy letterhead and used his reservist title, the Navy would not have invoked Article 1149. Article 1149 was invoked because of the discussion of the holdback of FA/18 planes from the reservists in Banks' letter.

Banks was punished as a whistleblower. The content of his letter related to possible government waste and/or misconduct and the Navy objected to his revealing their conduct. The indicia of official capacity relied on by the Navy and the courts below is not supported by any law or regulation. Further, it conflicts with basic First Amendment constitutional principles requiring strict construction of any law or regulation restricting First Amendment rights. This content-based restriction on speech and the fundamental right of a civilian to write to his Congressmen is an issue of paramount importance for this Honorable Court to examine.

C. THE IMPORTANT QUESTION FOR REVIEW IN THIS CASE IS WHETHER THE STRICT SCRUTINY OR BALANCING TESTS ARE MORE APPROPRIATE STANDARDS FOR REVIEW OF THE DENIAL OF FIRST AMENDMENT RIGHTS TO AN OFF-DUTY RESERVIST THAN THE MILITARY NECESSITY DOCTRINE USED BY THE LOWER COURTS.

Amicus Curiae asks that this Honorable Court grant the Petition for Writ of Certiorari because the facts of Petitioner's case present a unique opportunity for a reevaluation and revision of the Goldman v. Weinberger Doctrine. In turn, the Solicitor General has utilized Goldman v. Weinberger, supra, almost entirely to justify the decisions of the lower courts.

Albeit overly simplified, there appears to be currently three theories applied by federal courts to protect the constitutional rights of our citizenry which are uniquely raised in the instant case. These are:

(1) For private citizens, this Honorable Court has required a test on constitutional, particularly First and 14th Amendment, issues of "strict scrutiny";

(2) To protect the constitutional, and particularly First Amendment rights of government employees, the test this Court applies has been labeled the "balancing test."

(3) The constitutional rights of military personnel are subject to a third jurisprudence approach known as the "Military Necessity Doctrine."

A recent comparison of the "strict scrutiny" and the "balancing" tests, is made in the concurring opinion of Justice Stevens and the dissent of Justice Scalia joined by the Chief

Justice, and Justices Kennedy and O'Connor (in part) in Rutan v. Republican Party of Illinois, 497 U.S. ____, 111 LEd2d 52, 70, 78, 81-85, 110 S Ct ____ (1990).

The "Military Necessity" Doctrine as expounded in Orloff v. Willoughby, 345 U.S. 83 (1953) to Goldman v. Weinberger, supra, seems to be an aberration which, thinly disguised if disguised at all in Orloff v. Willoughby, supra, reflects an approach of the political jurisprudence school rather than the legal realism school. Essentially in Orloff v. Willoughby, supra, the Court said to the military that if you keep off of our turf, we'll keep off of yours. It is the rationale of Orloff v. Willoughby, supra, and Goldman v. Weinberger, supra, which created and expounds the "Military Necessity Doctrine." The result in both cases, particularly in Orloff v. Willoughby, supra, may have been the same if the "balancing test" had been applied.

Although the facts in Petitioner Banks' case seem peculiarly appropriate for this Honorable Court to take a new look at the Military Necessity Doctrine, they are distinguishable from Goldman v. Weinberger, supra, in that Banks was not a full-time member of the Armed Services on active duty when he wrote to Congressmen. Indeed, at the specific time in issue, he was not in any duty status whatsoever and in every other respect such as pertains to pay, jurisdiction under the Uniform Code of Military Justice, disability benefits, medical and hospital benefits and, particularly in view of the plain language of 5 U.S.C. §2105(d), he was in a civilian status. But this difference in Petitioner's factual situation serves also to emphasize that the lower courts' decisions in Petitioner's case, which extend the "Military Necessity Doctrine" to all reservists not on active duty, which includes members of the National Guard and the National Air Guard who are not on active duty, and by implication to the military retired community as well, essentially

doubles the number of persons who are subjected to this arbitrary and open-ended doctrine. It is a substantial break from the long standing tradition of the military as codified in 5 U.S.C. §2105(d), which declares off-duty reservists are not public employees.

Further, Article 1149 does not prohibit Banks from using official letterhead in communicating with Congressmen as he did. To find differently, the lower courts had to consider themselves mandated by the Military Necessity Doctrine to construe Article 1149 very broadly and 10 U.S.C. §1034 narrowly. The protection of Banks' First Amendment rights probably should have been based upon the "strict scrutiny test" because he was a civilian when his letters to Congressmen were composed, written and mailed. Even under the balancing test as applied by the dissent in Rutan, the legislative declaration of an off-duty reservist as a non-public employee in 5 U.S.C. §2105(d) and the Navy's traditional and consistent treatment of off-duty reservists probably outweighs the military's desire to restrict free speech in this case.

It is necessary and important for this Honorable Court to determine what doctrine should be used to analyze the restriction on First Amendment rights of off-duty reservist personnel, particularly in light of the growing importance of reservists in our national scheme of defense readiness.

III.

CONCLUSION

Goldman v. Weinberger, supra, does not apply to Petitioner Banks under the facts of this case because he was not in any duty status at the time he wrote to Congressmen. An off-

duty reservist is not a public employee under 5 U.S.C. §2105(d) and is therefore a civilian who may write to Congressmen without military censorship. To apply Goldman v. Weinberger, supra, to off-duty reservists extends that decision to many millions of reservists and retired military personnel while they are not serving in the military. This Honorable Court's review of such a broad, far-reaching extension of the Doctrine of Military Necessity to restrict First Amendment rights is absolutely critical and of paramount importance. The basic concept and traditional foundation of the military reserve system is at stake.

Respectfully Submitted,

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